1947.

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File No. G. of I. II/147
Part II

Legal DEPARTMENT
B BRANCH

Subject:—

Rules and Notifications
under
the Govt of India Act,
1935

{ for previous papers pl. see part I }

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Office of the S.P.A.

The proposal is to make a new Rule 15A as under for insertion in the Bombay Civil Services Conduct, Discipline and Appeal Rules:

"15A.- Every Government servant shall, immediately on admission into Government service and thereafter on the first of April annually, make to the authority competent toappoint him and through the usual channel a decalration of all moveable property held by him and his wife and aby other relative dependent upon him.

Note 1. Moveable property means 'cash ,stocks, securities, ornaments and valuables for the purpose of this rule.

Note 2. Members of the Inferior Services shall be excluded from the scope of this rule".

It is also proposed to add adeclaration in the following form to be made by the Government servant concerned:

"Moveable Property Return

(See rule 15-A of the B.C.S., C.D. & A. Rules).

Form of valuation of moveable property held or acquired by a Government servant, his wife and dependants(to be used with such modification, if any, as may be necessary).

I, ----------,Holding the
(full name)
appointment of ----------under the Government of Bombay , say that I have truly set forth in the annexure all the property, together with its value, held or acquired by me, my wife and and dependants of of which I am required to make a declaration under rule 15-A of the B.C.S.,C.D. & A.Rules. My present pay is ----------".

The rule and form of decalration impose an obligation on every Government servant to declare all moveable property held not only by himself but also by his wife.The object of the provision is to enforce disclosure by the husband of all the properties held by him as well as by his wife with a view to checking corruption. The question raised for condideration is whether such arule and form of declaration are intra vires.

Section 241 of the Government of India Act, 1935,provides for recruitment of Government servants and their conditions of service . Under sub-section(2) of the said section 241 , except as expressly provided by the Act, the conditions of service of persons serving His Majesty in civil capacity in India shall be such as may be prescribed in the case of persons serving in connection with the affairs of the Federation by rules made by the Governor General or by some person or person authorised by

the Governor General to make rules for the purpose, and in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province or by some person or persons authorised by the Governor to make such rules, The power conferred on Government under this section is wide and, in my opinion, it would be competent to the Government under this section to make rules prescribing such conditions of service as it thinks fit. A rule to the effect as proposed above that a Government servant shall make a declaration of moveable property held not only by him but also by his wife, appears intra vires of section 241 of the Government of India Act, 1935.

In fact, in so far as immoveable property is concerned there is already a rule inexistence in the Bombay Civil Services Conduct, Discipline and Appeal Rules, which casts a similar obligation on a Government servant in regard to the immoveable property held by a Government servant's wife. .

Although, as far as competence is concerned, it will be within the power of Government to make a similar rule as proposed in respect of moveable property, a difficulty is likely to arise in actual practice if the wife of a Government servant refuses to make a declaration to her husband of her moveable property. xxxxxxxxxxxxxxxxxxxxxxx There is no law as far as I am aware under which a wife can be compelled to make such a declaration. Usually she will not hide her property from her husband, but cases are easily conceivable wherein she may not be willing to disclose the extent of her moveable property to her husband. In a case in which she refuses to make a disclosure to her husband who may be a Government servant, the question arises how the Government servant concerned can comply with the rule.

To meet such cases it is possible to add one more note, Note No3, to Rule 15-A on the following lines:

> "Note 3. A Government servant shall be excluded from the scope of this Rule as regards any property held by his wife if he satisfies the authority competent to appoint him that he is for any special reasons unable to have knowledge about such property".

But if such a note is added, instances may multiply where

a Government servant, wanting to shield his wife's or dependent's property, may fall back upon the note.

The Advocate General is requested to advise whether the view taken above is correct. He is further requested to advise whether legislation for the purpose in view would be necessary and if so, whether it would be competent for the Provincial Legislature to undertake the same.

O.C. XXXXX.

Sd/-D.V.W.

Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 8383 dated the 14th August 1947.

V.VK. 11/8/1956/

SC.

No.30 of 1947.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT,
Bombay, 30th September 1947.

U.R.-to the Advocate General, Bombay, -
No. 8332, dated 14th August 1947.

Subject :- GOVERNMENT SERVANTS' CONDUCT RULES.
Framing of a Rule for the collection of return of property possessed by-Government Servants.

O P I N I O N.

It is competent to the Governor or Governor General to make such a rule as is proposed. Section 241(2) of the Government of India Act is sufficiently wide to enable it to be done.

The obligation to make a statement as to the property of the wife or dependant causes difficulties. A government Servant may say that his wife refuses to give particulars of her property. How is he to satisfy any authority that what he says is correct; and is it possible, in these days, to say that such an attitude on the part of a wife is unlikely; or that there is any presumption that such an explanation by the Government Servant is not true. The matter so far as it concernes declaration of property other than his own must depend on the Government Servant having that domestic dominance which is conventionally understood to exist.

The word "dependant" in the proposed rule is of very elastic import. It can include a relation who actually lives with the Government Servant and is wholly dependant as understood in the usual sense, and also someone, who though not living with the Government Servant, is being helped pecuniarily by him. It may be difficult for a Government Servant to get a statement as to the property of such dependant.

V.V.K. 14/8/1956/ 50.

dependent.

The proposed rule imposes an absolute duty. If the Government Servant for some reason e.g. the refusal of his wife, cannot fulfil it, he will be in default. There must therefore be some provision enabling that default to be excused, otherwise he remains liable to any pains and penalties. Accordingly notwithstanding thepossible misuse, Note(3) or some similar provision will be necessary.

So long as Section 241(2) of the Constitution Act is there, legislation is not necessary.

Sd/-

Advocate General.

V.M. 14/5/1956/ SC.

Office of the H.L.A.

In forwarding herewith a copy of the Advocate General's opin n No.80 dated the 30 the September 1947 together with the Statement of the Case prepared for the Advocate General, I would add the following remarks.

1. The Advocate General says that the matter so far as it concerns declaration of property other than his own must depent on the Government servant having that domestic dominance which is conventionally understood to exist. I am afraid that when we consider the legality of rule, it would not be proper to rest it upon mere conventions ~~as~~ popularly understood, Under the ordinary principles of law applicable to communities other than Hindus and Muhammadans, married women can have separate property. Under the Hindu law, a woman has absolute power of disposal over her saudayika stridhana even during coverture, and saudayaka includes gifts made to a woman at, before, or after marriage, by her parents and their relations, and also by her husband and his his relations, in other words gifts from relations as distinguished from strangers. Over such saudayka stridhana, her husband has no control- See Mulla's Hindu Law, 1946, 10th edn. p.137. Similarly whatever is inherited by a daughter or sister becomes her stridhana over which also the husband has no control. Under the Muhammadan Law, a wife can have separate prperty of her own. Thee great bulk-ofmoveable propetty particularly valuables and jewellety which wivesare likely to possess would be covered by the above principles of law. It follows that under any rule regulating the conditions of her husband's service, a wife would not be compellable to make a declaration of her property. It would, therefore, be difficult to enforce the rule against the husband; for, he can always plead that his failure to make a

return cannot amount to misconduct as in law he is powerless to obtain the requisite information from his wife.

2. The above remarks apply with equal force to dependants in so far as they are adults and can have property of their own, as e.g. grown-up sons or daughters, In the case of dependants who are minors it may not be worthwhile having information about the propetty held by the Government servant in their name

3. It must also be pointed out that in the event of the declaration being found incomplete or being suspected to be false for any reason, thercis no power to comple a verification. That can only be done by a search and an inventory of the moveable property held by the Government servant in question. The rule would not entitle Government to make such an inventory; and without making it, it would not be possible to prove the falsity of the declaration. Without establishing the falsity it would not be feasible to take action against the Government servant for misconduct. Consequently for all practical purposes the rule would have no sanction behind it.

4. In this respect, immovable property stands on a different f-ooting, inasmuch as we can always get accurate information, either from the Record of Right or from the Property Register, aboub the owner and also about the approximate valus of the property, so that verification of the information supplied by the Government servant presents no difficulty.

5. It would seen necessary to define more precisely the scope of the words "ornaments and valuables" for without such definition artieles even of small value would have to be declared. Some pecuniary limit of value in respect of ornaments and valuables must, therefore, be prescribed, We must also specify the articles which we propose to

include in or exclude from these terms e.g. furniture, apparel.

6. In case it is decided to frame a rule, it is a mat er for consideration whether it may not be more useful from the point of view of Government and helpful to the Government servant that provision should be made in the form for indicating, wherever possible, the sources of the [illegible] in fund out of which he made the pruchase of the moveable property or in case of gifts by relations or friends for supplying their names.

7. In conclusion I would invite attention to sub-section (3) of section 5 of the Prevention of Corruption Act, 1947, which would seem to meet the cases of corrupt officers who are in possession of property beyond their means.

O.C.

Id/M.P.M.L.
dt/- 21/11

Remembrancer of Legal Affairs.

U.R. to P.& S.D. No. 405 confl. dated the 22nd November 1947.

V.VK. 14/5/50/

SC.

- Legal Department.

--The su ject of holding elections under the new Constitution is nautrally not covered by any of the entries in the list subjects allotted to the Legal Department. Entries Nos.1 and 14 under that Department refer to elotions to the Provincial Legislature subject ot the provisions of the Government of India Act, 1935, and of any Order in Council made thereunder, and elections to the Federal Legislature (other than first elections under the Act) subject x to the propisions of the Act and of any Order in Council made thereunder. The impending elections under the new Constitution do not strictly fall under these items.On the other hand, "Constitutional Reforms" is a subject allotted to the Political & Services Department; see entry 42. There is also the residuary entry No.69 under which any subject not mentioned elsewhere in the Schedule is allotted to the Political & Services Department. The work of preparing electoral rolls on thebasis of adult franchise is, properly speaking, referable to "Constitutional Reforms" to which head the entire sit-up under the new Constitution would relate. The words in parenthesis in entry No. 14 allotted to the Legal Department show that even the first elections to the Federal Legislature under the Government of India Act, 1935, were not allotted to the L.D. The C.S. presumably realizes that the election of the Governor on the basis of the same roll is not a subject for the Legal Department but is a subject for the P. & S.D. The first elections to the Federal Legislature and the first election of the Governor would, in any case, be subject for the P. & S. D todeal with . I understand that the preparation of the

electoral rolls and the conduct even of the first Provincial elections under the Government of India Act, 1935, was not undertaken by the L.D. but by a special office known as the Political & Reforms Office. It is desirable that all the three first elections, namely, that, to the Federal Legislature, to the Provincial Legislature, and of the Governor , should be conducted and preparations therefor made by the same office particularly as the electoral rolls will be common. I would, therefore,, suggest that looking to the colossal nature of the task , a separate office should be ~~&~~ set up not only to arrange for the preparation of the electoral rolls and the conduct of the elections but for all problems connected with the new Constitution , as was done at the time of the last political reforms.

Id/-P.M.L.
dt/-5/12/1947/

Secretary to the Government of Bombay
Legal Department.

U.R. to P.& S.D. No. 11695 , dated the 6th December 1947.

V.VK. 14/5/56/ 50.

Government of India
Act, 1935, sections
134 and 140.
(Competance of the
Provincial Government)
to levy cess on
forest produce.

Office of the R.I.A.

No definite opinion can be expressed unless the actual provisions of law levying the cess or surcharge on the existing duty are examined to find out the real nature of the tax proposed to be levied. The decided cases on Constitutional Law make it clear that in classifying a tax or duty the Courts will ignore the label which it may bear and examine its real nature. In other words, it is not the name of the tax but its real nature, its pith and substance which the Courts will take into consideration in determining whether it can be levied by the Dominion or Provincial Legislature. It will , therefore, be necessary to consider the real nature of the cess which it is proposed to levy on forest produce. If it is duty levied upon a manufactured or producer in respect of the commodity manufactured or produced, it is as held by the Privy Council in the case of "Boddu Paidanna" (6.P.L.J.69), consistently with the decision of the Federal Court in Re. the Central Provinces and Berar Act, a duty of excise and it will be within the competence of the Dominion Legislature to levy it. If on the other hand the tax is not upon goods but upon sales or the proveeds of sale of goods it will be within the competence of the Provincial Legislature to levy it.

2. If the proposed cess is a duty of excise it will be open to the Dominion Legislature to pass an Act under section 140 of the Government of India Act, 1935 , providing for the distribution of the whole or any part of the net proceeds of the duty among the Provinces. It must be made clear that this section contemplates the levy and collection of the duties of excise by the Dominion and then

an Act of the Dominion Legislature providing payment out of the revenues of the Dominion to the Provinces sums equivalent to the whole or any part of the net proceeds of the duty, and further a distrivution of those sums among the Provinces in accordance with such principles of distribution as may be formulated by the Act. It will not, therefore, be open to any particular Province to claim the whole of the net proceeds of the duty levied and collected in than Province. Under section 124 of the Act, the collection of the duty can be entrusted to the Provincial Government , but that will be a question of policy forthe Central Government to decide.

D.O. Id/-P.M.L.
dt/-28/11/
Remembrancer of Legal Affairs.

U.R. to H. & ~~XXX~~ L.G. Department, No. 1171 , dated the 28th November 1947.

v.vk. 14/5/56/ 5C.